**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Applications of Adelphia Communications Corporation, Comcast Corporation, and Time Warner Inc. | ) | MB Docket No. 05-192 |
| | ) | |
| For Approval to Transfer Control and/or Assign Various Authorizations and Licenses | ) | |

TO: The Commission

# RESPONSE OF THE NATIONAL ASSOCIATION OF BROADCASTERS TO COMMENTS AND PETITIONS TO DENY

The National Association of Broadcasters ("NAB")[1] submits this response to the various petitions to deny against, and comments filed on, the applications of Adelphia Communications Corporation ("Adelphia"), Time Warner Inc. ("TW") and Comcast Corporation ("Comcast") to transfer control of and/or assign various FCC licenses and authorizations.[2] A number of multichannel video programming distributors (including satellite operators, small cable system operators and cable overbuilders), cable programming networks, other media entities, and public interest groups have expressed particular concern about the increase in concentration – especially

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[1] NAB is a nonprofit incorporated association of radio and television stations, which serves and represents the American broadcasting industry.

[2] As described by the FCC in its public notice seeking comment on the proposed assignments and transfers, the parties plan to effectuate a series of transactions ("Transactions") that will result in the transfer of Adelphia's cable systems and assets to Time Warner and to Comcast and the exchange of certain cable systems and assets between Time Warner and Comcast. Public Notice, *Adelphia Communications Corporation, Debtor-in-Possession, Time Warner Inc. and Comcast Corporation Seek Approval to Transfer Control and/or Assign FCC Authorizations and Licenses*, DA 05-1591 (rel. June 2, 2005).

regional concentration – that would result from the Transactions and the enhanced market power that TW and Comcast would possess vis-à-vis competitors and other entities in the video marketplace. These parties have consequently called for the Commission to impose a variety of conditions on the Transactions or to deny the proposed assignments and transfers entirely. NAB generally agrees with commenters expressing reservations about the competitive effects of the Transactions, and additionally points out that local broadcast stations that must deal in the marketplace with powerful, regionally concentrated cable operators have similar concerns. Thus, if the Commission ultimately determines to approve the Transactions with conditions designed to prevent competitive abuses, the Commission should include conditions to ensure that local broadcast stations may negotiate reasonably and appropriately with large regionally clustered cable systems for, *inter alia*, retransmission consent and the carriage of digital signals, including multicast programming streams.

## I. The Proposed Transactions Clearly Present Competitive Concerns, Especially For Entities That Must Deal With Nationally And Regionally Concentrated Cable Operators In The Video Marketplace.

The commenters in this proceeding have demonstrated that a highly concentrated cable industry -- especially an industry regionally consolidated -- would result from the proposed Transactions. For example, if permitted to acquire the Adelphia systems, Comcast would increase its share of cable subscribers in the Washington, D.C. Designated Market Area ("DMA") from 53 percent to 71 percent, and its share of multichannel video programming distributor ("MVPD") subscribers would jump from 38 to 51 percent. In the Baltimore DMA, Comcast's share of cable subscribers would increase from 93 to 97 percent, and its share of MVPD subscribers would rise from 76 to 80 percent.[3] While the enhanced national

[3] Petition of TCR Sports Broadcasting Holding, L.L.P. to Impose Conditions Or, in the Alternative, to Deny Parts of the Proposed Transaction ("TCR Petition") at 14 (filed July 21, 2005).

consolidation of Comcast and TW is also concerning, NAB agrees with commenters that these high levels of regional concentration raise especially serious competitive questions.[4]

Commenters further explained in detail how the "extraordinary" regional concentration (or, indeed, "regional monopolies") created by the Transactions would threaten competition in the video marketplace. Comments of DIRECTV at 6; 29. A number of commenters expressed particular concern about the enhanced market power and dominant bargaining position these large clustered cable operators would enjoy vis-à-vis competitors and other entities (such as programmers trying to obtain carriage) in the video marketplace. MVPDs (including satellite operators, cable overbuilders and small cable systems), regional sports networks, and other cable programming networks either opposed the Transactions, or at least requested that the Commission place appropriate conditions on the Transactions to prevent TW and Comcast from abusing their increased market power to the detriment of competition and, ultimately, consumer welfare.[5]

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[4] *See* Comments of DIRECTV, Inc. at 9-10; 29 (filed July 21, 2005) (Transactions "will create extraordinary concentration in many regional markets," citing, *inter alia*, HHI figures in relevant regional markets); TCR Petition at 2 (asserting that concentration levels produced by the Transactions are "unthinkable"); Comments of Echostar Satellite L.L.C . at 5-6; 8-10 (filed July 21, 2005) (noting both the increased national reach and the clustering of TW and Comcast as result of the Transactions); Petition to Deny of America Channel LLC at 29-33 (filed July 21, 2005) (detailing greatly increased concentration in top 50 DMAs and increased national reach of TW and Comcast as result of Transactions); Comments of RCN Telecom Services, Inc. at 2-3 (filed July 21, 2005) (discussing increased national concentration and regional clustering produced by Transactions); Comments of Communities at 4 (filed July 21, 2005) (arguing that regional clustering has given cable operators "de facto monopoly" status in many areas); Petition to Deny of Communications Workers of America and International Brotherhood of Electrical Workers at 9-19 (filed July 21, 2005) (describing the increased national and regional concentration and enhanced market power of TW and Comcast from proposed Transactions); Petition to Deny of Free Press, *et al*. at 6-9 (filed July 21, 2005) (discussing reduction in competition due to increased national and regional concentration from Transactions).

[5] *See* Comments of DIRECTV at 8-25 (Transactions would enhance TW's and Comcast's market power, thereby giving applicants the incentive and ability to extend anti-competitive strategies for regional sports programming to many new markets); Petition to Deny of America Channel at

## II. Conditions Imposed On The Proposed Transactions To Prevent Competitive Abuses Should Include Conditions Ensuring That Local Broadcast Stations Can Deal Reasonably And Appropriately With Large Clustered Cable Operators.

NAB points out that the same competitive concerns expressed by MVPD competitors, regional sports networks, and other cable programming networks also apply to broadcasters. Local broadcast stations must negotiate with increasingly consolidated cable systems for retransmission consent specifically and for the carriage of their analog and digital signals, including multicast programming streams, more broadly. Other commenters have recognized that the significant rise in regional concentration resulting from the Transactions would "have a dramatic impact upon the negotiating power of [broadcast] licensees" and would "tip the balance of power" in carriage negotiations "to Comcast and Time Warner."[6] Thus, if the Commission ultimately approves the proposed Transactions with conditions to prevent competitive abuses by the increasingly consolidated and regionally clustered Comcast and TW, the Commission should adopt conditions to prevent any abuses of market power and bargaining position vis-à-vis local broadcast stations. As the Commission's consideration of the proposed Transactions advances, NAB is willing to work with Commission staff to develop the substantive details of any such conditions to ensure that local broadcasters can negotiate reasonably and appropriately with TW and Comcast for carriage of their analog and digital signals, including any multicast programming streams.

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18-44 (proposed Transactions would give Comcast and TW enhanced market power to favor their affiliated programming and to exclude independent programming networks from the market); Comments of RCN Telecom at 8-9 (Comcast's and TW's increased dominance in cable market would impair ability of cable overbuilders to continue to compete); Comments of Echostar at 4-10 (Transactions would increase Comcast's and TW's market power and their incentives to behave anti-competitively by withholding popular regional sports and other programming from competing MVPDs); TCR Petition at 3-17 (Transactions would increase Comcast's incentive and ability to discriminate in the market for regional sports programming).

[6] Petition to Deny of Free Press, *et al.* at 38 (filed July 21, 2005).

Indeed, as the Commission more generally considers retransmission consent and other carriage issues, including digital must carry, it should keep in mind that the cable industry *as a whole* is concentrated nationally and clustered regionally and is dominated by a smaller and smaller number of larger and larger entities.[7] Contrary to certain representations made in other contexts,[8] the more typical cable operator that serves most viewers across the country is not a small and/or rural operator but a large, vertically integrated entity with national reach and regional dominance. The significantly enhanced market power and bargaining position that flow from increased national horizontal reach and regional concentration also mean that local broadcast stations (especially smaller ones) will be much less likely to be able to negotiate successfully for carriage of their digital signals, including any multicast programming streams.[9] Such growth in horizontal concentration in the cable industry, as exemplified by the proposed

[7] For instance, in June 2004, the four largest cable operators served approximately 58 percent of all U.S. cable subscribers. Eleventh Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 20 FCC Rcd 2755, 2763 (2005). Even in the smaller (DMA 101+) television markets, the majority of cable subscribers are served by one of the four largest cable MSOs. *See* NAB, *et al*., Opposition to American Cable Association Petition for Rulemaking, RM No. 11203, at Appendix A (filed April 18, 2005). The academic literature has also documented the steady increase in horizontal consolidation in the cable industry. *See, e.g.,* P.R. Parsons, *Horizontal Integration in the Cable Television Industry: History and Context*, 16 J. Media Econ. 23, 38 (2003) (over past several decades, "horizontal integration in the cable industry has never shown any serious inclination to reverse or even stabilize"); Sylvia Chan-Olmsted, *Market Competition for Cable Television: Reexamining Its Horizontal Mergers and Industry Concentration*, 9 J. Media Econ. 25, 38 (1996) (discussing "trend toward horizontal mergers and an increase of market concentration in the cable industry").

[8] *See* Petition for Rulemaking of American Cable Association, RM No. 11203 (filed March 2, 2005) (petition for rulemaking to amend rules on retransmission consent, network nonduplication and syndicated exclusivity).

[9] NAB has requested the FCC to reconsider its decision declining to require cable systems to either (i) carry both the analog and digital signals of local commercial television stations during the digital transition; or (ii) carry multicast programming even after the transition is completed. *See* Second Report and Order and First Order on Reconsideration, *Carriage of Digital Television Broadcast Signals*, 20 FCC Rcd 4516 (2005).

Transactions, thus has clear relevance for any broader consideration of the Commission's digital must carry rules and the existing retransmission consent regime.[10]

## III. Adopting Conditions To Ensure A Competitive Video Marketplace And To Prevent Abuses Of Bargaining Power Will Serve The Public Interest By Ensuring Consumer Access To Programming From A Wide Variety of Sources, Including Local Broadcasters.

As widely recognized, entities such as cable operators that own both distribution systems and content have a particularly strong incentive to disfavor unaffiliated content providers seeking distribution to consumers. Indeed, the U.S. Court of Appeals for the District of Columbia Circuit has explicitly opined that "a cable operator," because it has an "incentive to favor its affiliated programmers," may, "as a rational profit-maximizer, compromise the consumers' interests."[11] To counteract this natural incentive of cable operators to favor their own content over the content of unaffiliated entities, and to protect the interest of consumers in receiving content from a variety of competing sources, commenters have urged the Commission to adopt a number of

[10] *See* Michael Z. Yan, *Market Structure and Local Signal Carriage Decisions in the Cable Television Industry: Results from Count Analysis*, 15 J. Media Econ. 175, 188-89 (2002) (empirical study concluded that "horizontal concentration or larger firm size in the cable television industry has a negative effect on the carriage of local broadcast stations on cable systems" and that "noncarraige may be more serious in small rural areas," thereby "rais[ing] a public policy issue about the long-term viability of local broadcast stations in already fragile small markets without the umbrella protection of the must-carry rules"). Congress had in fact concluded -- even prior to the waves of cable industry consolidation in the 1990s and beyond -- that the cable industry was "highly concentrated" and that such concentration could create barriers to entry for programmers and a reduction in the number of media voices available to consumers. 47 U.S.C. § 521 note (1992 Cable Television Consumer Protection and Competition Act § 2(a)(4)).

[11] *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313, 1322 (D.C. Cir. 2000). *See also* 47 U.S.C. § 521 note (1992 Cable Act § 2(a)(5)) (cable operators, especially ones vertically integrated with cable programmers, "have the incentive and ability to favor their affiliated programmers," thereby making "it more difficult for noncable-affiliated programmers to secure carriage on cable systems"); *Report and Order* in CS Docket No. 01-290, 17 FCC Rcd 12124, 12153 (2002) (FCC concluded that vertically integrated cable programmers continued to have the incentive and ability to favor affiliated cable operators over other MVPDs "such that competition and diversity in the distribution of video programming would not be preserved and protected" without program access requirements).

conditions to prevent TW and Comcast from behaving anticompetitively toward unaffiliated programming networks and from denying their affiliated programming to competing distributors.[12]

Similar conditions would likely be necessary to preserve consumer access to the content offered by local broadcast stations unaffiliated with TW and Comcast. In fact, the Supreme Court has recognized that cable systems have "systemic reasons" to disadvantage broadcast stations in particular because "cable has little interest in assisting, through carriage, a competing medium of communication."[13] And if "cable incumbents can dictate terms and freely deny carriage to broadcast licensees," it is "viewers" that will "suffer the greatest harm." Petition to Deny of Free Press, *et al*. at 38. Conditions adopted by the Commission to ensure that broadcasters may negotiate reasonably and appropriately with TW and Comcast for, *inter alia*, retransmission consent and the carriage of digital signals, including multicast streams, will serve the public interest by "promoting the widespread dissemination of information from a

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[12] *See* Comments of DIRECTV at 44 (proposing conditions to ensure that MVPDs competing with Comcast and TW have access to the programming of regional sports networks, including those networks affiliated with Comcast or TW); Petition to Deny of America Channel at 5-6 (proposing mandatory arbitration and guaranteed leased access on reasonable terms to ensure that independent programming networks have recourse if Comcast and TW refuse access); Comments of Echostar at 2-3 (proposing three conditions to ensure that regional sports programming and other programming affiliated with TW or Comcast are available to other MVPDs); TCR Petition at 19 (proposing that Comcast be required to divest its interest in its own regional sports network or, in the alternative, that Comcast be prohibited from engaging in any discriminatory conduct based on affiliation or nonaffiliation with Comcast); Petition to Deny of Free Press, *et al*. at 43 (proposing extension of program access rules to video on demand).

[13] *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 201-202 (1997) (explaining that cable systems have the incentive to disadvantage broadcast competitors "in favor of programmers – even unaffiliated ones – less likely to compete with them for audience and advertisers"). *See also* 47 U.S.C. § 521 note (1992 Cable Act § 2(a)(15)) ("A cable television system which carries the signal of a local television broadcaster is assisting the broadcaster to increase its viewership, and thereby attract additional advertising revenues that otherwise might be earned by the cable system operator. As a result, there is an economic incentive for cable systems to terminate the retransmission of the broadcast signal, refuse to carry new signals, or reposition a broadcast signal to a disadvantageous channel position.").

multiplicity of sources" (including those not under the control of the cable operator) and by guaranteeing access to "free, over-the-air local broadcast television" for all viewers, especially those who do not subscribe to cable.[14]

## IV. Conclusion

For the reasons set forth in the oppositions and comments of numerous parties, the proposed Transactions present clear competitive concerns, especially for entities, including broadcasters, that must deal with nationally and regionally concentrated cable operators in the video marketplace. Thus, if the Commission ultimately approves the Transactions with conditions to prevent competitive abuses, the Commission should include conditions to ensure that local broadcast stations may negotiate reasonably and appropriately with Comcast and TW for, *inter alia*, retransmission consent and the carriage of digital signals, including multicast programming streams.

Respectfully submitted,

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[14] *Turner*, 520 U.S. at 189-90 (recognizing these as important governmental interests).

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing response of the National Association of Broadcasters were served via first-class mail, postage prepaid, this 5th day of August 2005 upon the following:

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